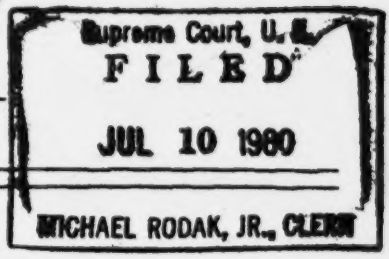
IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-37



ROY JOHN LESTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR
WRIT OF CERTIORARI

Michael J. McCabe
SAVITZ & McCABE
108 Ivy Street
San Diego, California 92101
Telephone: (714) 231-1181

Martin Lee Rakley
BEESON and RAKLEY
222 Ash Street
San Diego, California 92101
Telephone: (714) 233-1282

Attorneys for Petitioner
ROY JOHN LESTER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

ROY JOHN LESTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

QUESTIONS PRESENTED FOR REVIEW

Application of Exclusionary Rule to Interstate Law Enforcement

1. Whether a state court should apply the exclusionary rule to contraband seized pursuant to a search warrant where the warrant was the direct, non-attentuated product of a constitutionally unlawful detention by out-of-state police.

Use of Trained Sniffing Dog as Fourth Amendment Search

2. Whether the use by police of a trained

dog to sniff personal luggage for the presence of contraband is a search or seizure within the purview of the Fourth Amendment of the United States Constitution, and, if so, what degree of preknowledge by police is a constitutional prerequisite thereto.

Warrantless Seizure to Permit Exposure to Trained Sniffing Dog

3. Whether police may make a warrantless seizure of personal luggage to permit a trained dog to sniff for the presence of contraband absent probable cause and exigent circumstances.

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REFERENCE TO OPINION BELOW

The opinion of the Court of Appeal, Fourth Appellate District, Division One, which was certified for publication, appears as People v. Lester, 101 Cal. App. 3d 613 (1980).

JURISDICTIONAL GROUNDS

The Court of Appeal of the State of California entered its judgment on January 30, 1980. A copy of the opinion is attached and marked as Appendix "A". Petitioner's petition for hearing in the Supreme Court of the State of California was denied on April 10, 1980.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 USC Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Agent Alexander, a Drug Enforcement Investigator for the United States Department of Justice assigned to the San Diego County Narcotics Task Force, testified that on May 19, 1979, at approximately 4:30 p.m., he received a phone call from Officer Gann of the Houston Police Department, airport detail. Gann told Alexander to contact a Detective Burke of Florida's Broward County Sheriffs Airport Detail Narcotics Division regarding possible narcotics traffic coming to San Diego.

Alexander called Burke who related that he had "contacted" one Jim Gerardi and petitioner, Roy John Lester, in the Fort Lauderdale Airport. Burke told Alexander that petitioner's appearance drew his attention in that petitioner had a full beard, was extremely tall, casually attired with tennis shoes and was carrying a shoulder bag and checking a large suitcase. Burke related that petitioner had paid cash for a

one-way ticket and had looked around in all directions frequently, unlike other passengers.

Burke told Alexander that he "field interrogated" petitioner and Gerardi "for a few minutes" asking for production of identification and petitioner's destination and duration of stay in Florida. Petitioner provided identification and told Burke his destination (San Diego, with a stopover in Houston) and his duration of stay in Florida. Burke told petitioner that he was a narcotics officer conducting an investigation and petitioner reportedly asked "was he looking for cocaine."

Burke told Alexander that he had searched petitioner's handbag during the "contact" without result. Petitioner testified that he did not consent to the search of the handbag. Burke further related to Alexander that petitioner had refused to permit a search of his suitcase and that petitioner had told Burke that he would need a search warrant. Alexander admitted considering petitioner's refusal to consent

to a search to be significant and indicated same in his notes by putting stars next to the notation: "Refused look-see. More investigation. Said need warrant."

Petitioner testified further regarding the "contact" by Florida's officers and his testimony was uncontroverted. Petitioner testified that Burke had asked petitioner for identification, which he produced; that Burke took petitioner's ticket folder and asked petitioner to identify his checked suitcase, which he did; that after Burke continually asked for consent to search petitioner's suitcase and petitioner refused, Burke took petitioner to a little office where another agent was present and they continued to seek permission to search petitioner's suitcase and handbag; that despite petitioner's refusal, the agents searched his handbag without result; that after petitioner was in the room for ten to fifteen minutes Burke told him that a dog would be put on the suitcase at the Houston stopover or San Diego destination

and that petitioner should not try to switch planes because they would "get" him, whereafter petitioner was escorted onto the airplane.

Burke informed Alexander of petitioner's flight time, airline flight number, description of petitioner's suitcase, the name thereon (C. Kosh), that the suitcase was marked damaged and petitioner's physical description.

Alexander then obtained Agent Denmick, handler of the trained dog, Duster, from U.S. Customs and established a surveillance team at the San Diego airport. When petitioner's flight arrived and immediately after airline employees offloaded the luggage, Alexander identified petitioner's suitcase and removed it from the running conveyor belt leading to the public baggage area while other agents surveilled petitioner. Alexander placed petitioner's suitcase in a group of nearby luggage. Duster was released and "alerted" on petitioner's suitcase by biting, gnawing and and scratching it. Alexander then placed the suitcase amongst another group of bags

and Duster again "alerted", leading Agent Denmick to conclude to Alexander that petitioner's suitcase contained a controlled substance.

Alexander replaced petitioner's suitcase on the running conveyor belt approximately three or four minutes after its removal. When petitioner picked up his suitcase he was asked by a narcotics agent to accompany him to the Harbor Police office. Petitioner complied, appeared nervous and urinated in his trousers. Petitioner was detained until approximately 10:07 p.m. when Alexander obtained a telephonic search warrant whereby the contraband, ten pounds of hashish, was discovered.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEAL ERRONEOUSLY FAILED TO REVIEW THE ROLE OF THE CONSTITUTIONALLY UNLAWFUL DETENTION OF PETITIONER BY FLORIDA POLICE IN THE PROCUREMENT OF THE SEARCH WARRANT BY CALIFORNIA OFFICERS.

The published opinion of the California Court of Appeal blatantly ignores the role of the unlawful detention of petitioner by Florida police as clearly reflected in the record in the procurement of the search warrant by California officers. The opinion only recites that Agent Alexander "received a tip from the Fort Lauderdale Sheriffs office", even though petitioner's detention by Florida police is clearly and indisputably established by California's Agent Alexander's own testimony at petitioner's preliminary hearing. Petitioner had argued and again urges that the record clearly indicates that, as a matter of law, the search warrant was the direct, non-attenuated product of a constitu-

tionally unlawful detention by Florida police.

The United States Supreme Court has never specifically enunciated that a state court must scrutinize the constitutionality of an original contact by out-of-state police resulting in an in-state search or seizure. Certainly the policies behind the exclusionary rule of deterring investigative stops or detentions by police predicated on mere curiosity or hunch (Terry v. Ohio, 392 U.S. 1, 22, 88 S.Ct. 1868 (1968)) and protecting an individual's reasonable expectation of privacy from arbitrary invasions in the unfettered discretion of officers in the field (Brown v. Texas, 442 U.S. ; 99 S.C. 2637 (1979)) dictates such scrutiny.

This Court has resolved analogous issues raised by pre-1960 law wherein state searches were not considered subject to Fourth Amendment priniciples. After this Court ruled in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914), that evidence seized

by federal officers in violation of the Fourth Amendment was not admissible in a federal criminal prosecution, the practical difficulties of permitting evidence gained by searches by state officers in violation of Fourth Amendment rights to be handed over "on a silver platter" to federal agents became apparent. The "participation doctrine" (e.g., Byars v. United States, 273 U.S. 28, 47 S.Ct. 248 (1927); Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372 (1949)) ultimately evolved to encompass any participation by federal agents in state searches or by state officers acting on behalf of the United States until finally the Fourth Amendment was fully extended, through the Fourteenth Amendment, to searches and seizures by state officers in Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359 (1949), and the ultimate rejection of the "silver platter doctrine" in Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437 (1960).

Uniformity of result for inter-state law enforcement transactions vis-a-vis intrastate

transactions dictates that this Court affirm the necessity of piercing the out-of-state police "tip" in this case to its roots: the unlawful detention of petitioner by Florida police. The United States Constitution requires rigorous scrutiny by state courts of out-of-state police participation so that out-of-state officers may not "clean their dirty laundry" across state lines.

The unlawful detention of petitioner by the Florida officers is clear on the record. When the Florida police detained petitioner for the purpose of identifying him, and further interrogated him and searched his shoulder bag, the Florida police performed a seizure of petitioner's person subject to Fourth Amendment requirements (Brown v. Texas, supra).

Further, the detention was clearly made without even the minimal prerequisite of an objectively reasonable suspicion that petitioner was involved in some criminal activity (Terry v. Ohio, supra). Logic compels that neither facial hair, height, casual

attire, nor possession of a shoulder bag and large suitcase by a person traveling in an airport in any way suggests involvement in criminality. Similarly, payment for a $116.00 one-way flight in cash provides no inference of criminality. So, too, have courts uniformly rejected the notion that looking around or other signs of nervousness (e.g., United States v. Westerbann-Martinez, 435 F.Supp. 690 (1977); United States v. Pope, 561 F.2d 663, 668 (6th Cir. 1977); Remers v. Superior Court, 2 Cal. 3d 659, 664 (1970)) imparts any implication of criminality since to do so would for practical purposes involve an abrogation of the rule requiring substantial circumstances to justify the detention and questioning of persons.

This Court very recently addressed such Fourth Amendment parameters in the case of United States v. Mendenhall, ____ U.S. ____ (May 27, 1980), finding there that although officers in fact may have had no probable cause to search nor reasonable suspicion to detain the defendant, she had not been detained nor

"seized" by agents since a reasonable person, in full view of all circumstances would have believed that she was free to leave. Applying the very criterion of United States v. Mendenhall to the factual differences in the instant case must lead to the conclusion that petitioner was unlawfully detained.

In Mendenhall the defendant was approached by DEA agents in the airport because she arrived from a major drug source city, was the last person off her plane, appeared very nervous and looked around, proceeded past the baggage area without claiming luggage, and changed airlines for her flight out. DEA agents approached Mendenhall, took her license and her ticket, which bore a different name, questioned her, and after returning her license and ticket, asked if she would accompany them to the airport DEA office for questioning, which she did without objection. At the DEA office, Mendenhall was asked for, and gave, consent to search her person, resulting in the discovery of the contraband.

Mr. Justice Stewart's lead majority opinion in Mendenhall concludes that even if the circumstances known to the officers at the time of their "contact" with Mendenhall did not amount to a reasonable suspicion or probable cause, there was no need therefor since Mendenhall's search was the product of voluntary consent and not the product of an unconstitutional detention since a reasonable person under the circumstances would have felt free to leave. This Court found that Mendenhall's consent to talk to officers, accompany them to the DEA office, and permit a search of her person was voluntary and in the spirit of apparent cooperation.

The record in the instant case shows that petitioner could not objectively feel reasonably free to leave or that he voluntarily consented to a search or detention in the spirit of cooperation. Unlike the record in Mendenhall, there is no indication here that Burke returned petitioner's identification or ticket prior to putting him on the flight.

In the instant case, Agent Burke admitted being refused search consent and being told that he would need a warrant. Agent Burke admitted searching petitioner's handbag without result. Petitioner was badgered to consent to a search, threatened to not try to switch planes, and escorted to his flight. It is indisputable that petitioner's interaction with Florida agents cannot be characterized as voluntary nor in the spirit of apparent cooperation, and was clearly a detention.

The four dissenting Justices in Mendenhall, White, Brennan, Marshall, and Stevens, significantly joined to protest that the "contact" by DEA agents therein was indeed a detention not founded on reasonable suspicion. Since the intrusion in Mendenhall was less than the instant case, and the preknowledge greater, petitioner is confident that these Honorable Justices would again concur that the intrusions by Florida officers were unconstitutional.

It is well-established that evidence which would not have been obtained "but for" an illegal invasion must be excluded as

"fruit of the poisonous tree" unless there has been no exploitation of the illegality by police or the connection between such evidence and the primary illegality has become so attentuated as to dissipate the taint. (Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407 (1963)). It is clear that the California officers were catalyzed by the Florida intrusion and information received therefrom, in particular, petitioner's search consent refusal. The suitcase which was the object of the Florida officer's "investigation" and requests for petitioner's search consent was thereafter seized from the conveyor belt by the California officer as soon as it arrived in California. There was no possibility for nor actuality of attenuation or dissipation.

The unlawful detention in Florida was blatantly ignored by the California Court of Appeal. This Court should deflate the dangerous myth of the out-of-state police "tip" and affirm and encourage transactional analysis of interstate law enforcement activity.

II.

THE UNITED STATES SUPREME COURT SHOULD DECLARE AND ESTABLISH WHETHER USE OF A TRAINED DOG TO SNIFF PERSONAL LUGGAGE FOR THE PRESENCE OF CONTRABAND IS A FOURTH AMENDMENT SEARCH OR SEIZURE AND, IF SO, WHAT DEGREE OF PREKNOWLEDGE BY POLICE OFFICERS IS A CONSTITUTIONAL PREREQUISITE THERETO.

The current status of the law across the nation in regard to the constitutional ramifications of the use of a trained dog by law enforcement to sniff for contraband can be classified as inconsistent and ambiguous. The Supreme Court of the United States should establish whether or not such conduct indeed falls within Fourth Amendment parameters to provide certainty and uniformity to judicial decisions across the nation. California and federal decisions typify the national ambiguity and inconsistency in this area of criminal procedural law.

There are now four (4) published California appellate cases dealing with use of trained contraband-sniffing dogs. In People v. Furman, 30 Cal. App. 3d 454, 106 Cal. Rptr. 366 (1973),

the Court held that a trained dog's alert on a suitcase was sufficient corroboration of a reliable informant's tip to provide probable cause for a search. The Court left unaddressed the issue of what cause or preknowledge, if any, was required to justify use of a sniffing dog. In People v. Williams, 51 Cal. App. 3d 364, 324 Cal. Rptr. 32 (1974), the Court seemingly indicated that Fourth Amendment principles were indeed applicable, disapproving a general exploratory search with a sniffing dog in an airline baggage room citing "no probable cause" and denouncing the "search" as "illegal, a gross departure from constitutional principles." In People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 313 (1977), inexplicably ignored in the Court of Appeal's opinion in the instant case, the Court stated that "such a search with canines conducted without some preknowledge or reasonably strong suspicion that contraband is to be found in a particular location is a constitutionally impermissible invasion of the suspect's reason-

able expectations of privacy and consequently a violation of the Fourth Amendment." The opinion by the Court of Appeal in the instant case represents a regression to the simple, uncontested principle of Furman: That a trained dog's reaction may bolster probable cause. The Court of Appeal has abdicated the responsibility of addressing the crucial issue raised herein and thereby further obstructed resolution of that issue: What amount of preknowledge, reasonable suspicion or probable cause, is a constitutional prerequisite to use of a trained contraband-sniffing dog on personal luggage?

The federal cases too have been characterized by ambiguity and non-uniformity. In United States v. Solis, 536 F.2d 880 (9th Cir. 1976), the Court cited "founded suspicion" as Fourth Amendment justification for use of trained sniffing dogs. In United States v. Venema, 563 F.2d 1003 (9th Cir. 1977), the Court cited no "reasonable expectation of privacy" in a rented footlocker in a storage area commonly made accessible to police. In

United States v. Bronstein, 521 F.2d 459 (2nd Cir. 1975), the Court cited "ample cause" to justify a canine sniff-search. Another federal court has gone so far as to dismiss as "frivolous" the contention that a dog's sniffing of the air around a footlocker constituted an unconstitutional intrusion. United States v. Fulero, 498 F.2d 748, 749 (D.C. Cir. 1974).

Petitioner is beneficially interested in advocating the constitutional ramifications of the use of the trained contraband-sniffing dog since the exposure of his suitcase to the dog was not predicated on a legitimate, reasonable suspicion, much less probable cause, as discussed supra, but rather clearly on the mere hunch of the California officers based on petitioner's refusal to consent to a search in Florida.

III.

CALIFORNIA OFFICERS' WARRANTLESS SEIZURE OF PETITIONER'S SUITCASE TO PERMIT ITS EXPOSURE TO A TRAINED CONTRABAND-SNIFFING DOG WAS UNCONSTITUTIONAL SINCE PERFORMED WITHOUT PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES.

The record is clear that at the time California's Agent Alexander removed petitioner's suitcase from the running conveyor belt, leading to the public baggage area, immediately after it was unloaded from the plane, there was no probable cause to arrest petitioner nor search or seize his suitcase, as discussed supra. Agent Alexander admitted on the stand that he had no probable cause at that time. Rather, this further intrusion of petitioner was prompted by his search-consent refusal in Florida.

The Court of Appeal's opinion claims that the intrusion was "insignificant" since the time of the suitcase's removal from to replacement on the running conveyor belt was "only" about three minutes. Petitioner disagrees. This further intrusion on petitioner, resulting in his further detention, was

wholly unjustified and performed without constitutionally prerequisite preknowledge. An unconstitutional warrantless seizure is not "insignificant" merely because it is speedily performed. Indeed, the most thorough of searches and seizures may in some cases be performed in less than three minutes.

Petitioner's suitcase was indisputably seized, in that it was forcibly dispossessed from petitioner as distinguished from its voluntary surrender. The California officers were well aware of petitioner's refusal to a search or seizure of his suitcase in Florida.

To justify a warrantless search or seizure not incident to lawful arrest, the prosecution must show not only that probable cause existed to believe the item to be searched or seized contained contraband or other fruits or evidence of crime, but also that an emergency or exceptional exigent circumstance existed precluding the practicality of obtaining the required warrant (e.g., see Coolidge v. New Hampshire, 403 U.S. 443, 453-454 (1971)).

In the instant case, there were no exigent circumstances to justify a warrantless search or seizure of petitioner's suitcase. From the time Alexander first talked with Florida police immediately following his 4:30 p.m. call from Officer Gann from Houston, the suitcase was in the exclusive control of National Airlines. Therefore, the potential danger of "imminent destruction, removal, or concealment of the property to be seized" (Coolidge v. New Hampshire, Id.) required to justify the warrantless seizure was non-existent. San Diego officers had approximately four and one-half (4-1/2) hours to obtain a warrant to seize petitioner's luggage, but did not; that amount of time would apparently have been more than sufficient since the warrant eventually obtained from the magistrate, after the dog sniffed, was obtained within one hour of the dog's activities.

This Court has been consistently and persistently fervent in its reaffirmation of the principle that the expectation of privacy in the contents of closed luggage and

containers deserves the utmost constitutional protection and strict judicial enforcement of the warrant requirement (e.g., United States v. Chadwick, 433 U.S. 1 (1977)).

The warrantless seizure of petitioner's suitcase by California officers to permit the "hide-and-seek" contraband-sniffing procedure by the trained dog, Duster, was unlawful since made without probable cause and exigent circumstances. The subsequent search pursuant to the magistrate's warrant was the direct product of the unlawful seizure, and the contraband discovered thereby should have been suppressed as "fruit of the poisonous tree" on this third separate and independent ground.

CONCLUSION

For the foregoing reasons, petitioner, Roy John Lester, respectfully requests that a writ of certiorari issue to review the denial of petition for hearing to the Supreme Court of California entered on April 10, 1980.

Dated: July 7, 1980.

Respectfully submitted,

MICHAEL J. McCABE

MICHAEL J. McCABE
SAVITZ & McCABE

/s/

MARTIN LEE RAKLEY
BEESON and RAKLEY

PROOF OF SERVICE

I, the undersigned say: I am over 18 years of age, employed in the County of San Diego, California, in which County the within-mentioned mailing occurred, and not a party to the action. My business address is 108 Ivy Street, San Diego, California.

On July 8, 1980, I deposited in the U.S. mail, at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of PETITION FOR WRIT OF CERTIORARI FOR ROY JOHN LESTER, Petitioner, to the following:

Solicitor General of the United States
Honorable Wade McCree
Department of Justice
Washington, D.C. 20430

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 8th day of July, 1980, at San Diego, California.

MICHAEL J. McCABE

MICHAEL J. McCABE

Filed in the Court of Appeal
Fourth District
January 30, 1980

CERTIFIED FOR PUBLICATION

COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent v. ROY JOHN LESTER, Defendant and Appellant.	4 CRIM 11239 (Superior Court No. CR 43863)

APPEAL from a judgment of the Superior Court of San Diego County. Earl H. Maas, Jr., Judge. Affirmed.

Savitz & McCabe and Michael J. McCabe and Beeson and Rakley and Martin Lee Rakley for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, Jay M. Bloom and Alan S. Meth, Deputies Attorney General for Plaintiff and Respondent.

APPENDIX "A"

DUSTER'S DETECTION

Roy Lester appeals the judgment after he pleaded guilty to possessing marijuana for sale (Health & Saf. Code, § 11359) following the denial of his motion to suppress evidence (Pen. Code, § 1538.5). He received probation upon conditions, among them confinement to the sheriff's custody for 120 days and 500 hours of volunteer work in San Diego. These conditions were stayed pending appeal.

Lester, a law student in San Diego, went to Florida for a couple of days and returned with more than ten pounds of hashish. He got caught under circumstances where Duster the dog played no small part. Lester's Fourth Amendment rights remained intact.

Alexander, a U.S. Department of Justice official in San Diego, received a tip from the Ft. Lauderdale sheriff's office that Lester was suspected of carrying narcotics in his luggage on his flight to San Diego. A thorough description of Lester and his luggage was given. Alexander obtained the services of Duster and his handler from the U.S. Customs.

When Lester's flight arrived, his bag was placed on the conveyer belt for transportation to the public baggage area. Alexander, who with other agents had the right to be in the area, removed the bag and placed it in a group of nearby bags. Duster, an expert in narcotics detection, was released and strongly alerted on Lester's bag, biting, gnawing, and scratching it. The bag was hid from Duster in another group of bags close by. Again Duster alerted to it quickly. Alexander replaced the bag on the conveyer belt; the time from removal to replacement was insignificant, about three minutes. When Lester picked up the bag, an official asked him to accompany him to the harbor police office. Lester agreed. He was very nervous and urinated in his pants. When Lester refused permission to look in his bag, a search warrant was obtained and the contraband was revealed.

Without the need to cite other cases,[1/]

FOOTNOTE 1: E.g., Link's Link with Destiny, A Short Tale, (People v. Furman (1973) 30 Cal.App.3d 454; Bourbon's Nose Knows, or the case of Bourbon's Bust, People v. Williams (1975) 51 Cal.App. 3d 346.

these facts speak for themselves and clearly show probable cause for the conduct of the officials. In truth they reflect the restraint which is wisely applauded by the judiciary as being paradigm conduct. Rather than precipitously taking action without probable cause, the officials carefully investigated without interfering with Lester's rights, and at the proper moment, after developing a thorough case, arrested Lester.

Lester received exemplary legal representation, typical of the high standards of his trial attorney Robert Baxley.

Judgment affirmed.

CERTIFIED FOR PUBLICATION

/s/ Brown
P.J.

WE CONCUR

/s/ Cologne
J.

/s/ Staniforth
J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

San Francisco, California 94102

April 10, 1980

I have this day filed Order

HEARING DENIED

In re 4 Crim No. 11239

People

vs.

Lester.

Respectfully,

G.E. BISHEL
Clerk